IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 10/10
5839601

	BETWEEN	MARCUS MA'A Applicant
	AND	BRIX N BLOX LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Ben Paradza for the Applicant Maurice Aston for the Respondent
Investigation Meeting:	19 January 2010 at Wellington
Submissions Received:	19 January 2010
Determination:	27 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Marcus Ma'a, claims that his employment as a general mason for the respondent (Brix N Blox) was unjustifiably terminated, as it came out of the blue, without any previous warnings over his performance.

[2] Brix N Blox claims that it dismissed Mr Ma'a in reliance on an agreed trial period and that no warnings were therefore necessary. It also claims to have no assets or income from which to pay Mr Ma'a, should he be found to have been unjustifiably dismissed.

[3] The issues for determination are whether Mr Ma'a was unjustifiably dismissed during the course of his trial period and if so what remedies, if any, should be awarded to him.

The Facts

[4] Mr Ma'a was employed by Brix N Blox as a general mason with effect from 15 May 2008. As this preceded the passage of the amendment to the Act in relation to trial periods for 90 days or less (s.67A), those provisions can not benefit Brix N Blox.

[5] As a general mason Mr Ma'a reported to the company foreman, who in turn reported to Mr Aston, the Managing Director and a major shareholder in the company. Mr Aston's dealings with Mr Ma'a, however, were only every day or two and usually involved only pleasantries.

[6] There was a dispute between Mr Aston and Mr Ma'a at the investigation meeting about whether or not Mr Ma'a misled Brix N Blox that he was a qualified tradesman. Mr Ma'a was paid throughout as a general mason. While this pay rate was significantly higher than that of a general labourer, this issue was never raised with him when Brix N Blox found out that Mr Ma'a was not a tradesman. I conclude that it is therefore not necessary to determine that issue.

[7] An issue was raised early on in Mr Ma'a's employment about a job being out of plumb, but he denied responsibility, noting that there were other contractors involved. There was insufficient evidence to find that this was the responsibility of Mr Ma'a.

[8] There were certainly problems with Mr Ma'a's use of his mobile phone at work. Whatever the cause of that may have been, Mr Aston grudgingly accepted that after the matter had been formally raised by him as a matter of concern Mr Ma'a kept his phone in his car.

[9] There was also an issue in the middle of Mr Ma'a's employment about him threatening another worker with violence. I accept that Mr Aston was present on that occasion and told him to get on with the job, and that as the threatened worker wanted the matter taken no further, he took no further action, so Mr Ma'a was not made aware that his employment was in any way in jeopardy over the incidect. I also accept that Mr Ma'a later tried to apologise for his actions on the day.

[10] Through his foreman, Mr Aston also got reports that Mr Ma'a was not working hard enough and did not get on with other team members, because he was loath to help them with other jobs and did not like pouring his own mortar mix by hand when the mixing machines were broken. Then Mr Aston was informed that Mr Ma'a's work on an Island Bay job was not up to scratch.

[11] On 3 July, the day after attending a family funeral, Mr Ma'a was approached by Mr Aston, who had simply come to the conclusion that his work output and quality were not up to the Brix N Blox's standards. Mr Aston also took into account the use of the cell phone, the threat to a co-worker, and his lack of qualifications. In Mr Aston's mind the issue was simple, as Mr Ma'a's employment agreement provided for a trial period in the following form:

> *2.3 Performance Reviews*
>
> *The employee will be employed on a three month trial period.*
>
> *At any point in this period the employee may be re-assessed as to their suitability to perform the tasks set out for them, and if they are to remain employed by the employer.*
>
> *The employee will be supplied with a day book at the employer's expense, and this day book must be filled in with the number of blocks laid or other activities performed on each day. This day book must be produced on request to the employer. Failure to produce the day book will lead to an assessment of the employee's suitability to remain employed.*
>
> *The employer shall conduct a performance review of the employee on at least an annual basis. This review shall be taken into account in any salary reviews.*

[12] From Mr Aston's perspective that gave him carte blanche to dismiss Mr Ma'a, because of his unsuitability to the job of general mason. He did so without explaining any of Brix N Blox's concerns with Mr Ma'a, but simply informing him that his employment was to end.

[13] Mr Ma'a was given the opportunity to work out a week's notice or be dismissed summarily. He chose the latter and ended his employment on 6 August 2008. Because he had arranged to move from Titahi Bay into town in order to work for Brix N Blox in Wellington, he ended up without a place to stay.

[14] MrMa'a was unable to get another job for over five weeks. He claims $4,531.81 gross in lost remuneration accordingly.

[15] Mr Ma'a also gave evidence, supported by a friend who took him in, that he was embarrassed and upset by what Brix N Blox had done to him. He has sought $20,000 in compensation accordingly.

[16] Subsequently Brix N Blox has fallen on hard times, as it has been a victim of the recession affecting the construction industry in particular. It no longer employs any staff and has little work, a situation exacerbated since Mr Aston suffered a major accident (he is currently on ACC). The company has made a substantial loss for the year ended March 2009 and has no assets and significant liabilities. This may make any victory by Mr Ma'a somewhat Pyrrhic.

The Law

[17] Section 67 of the Act, relating to probationary arrangements, provides in subsection (1) that

> *Where the parties to an employment agreement agree as part of the agreement that the employee will serve a period of probation after the commencement of the employment –*
>
> *(a) The fact of the probation period must be specified in writing in the employment agreement; and*
>
> *(b) Neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustified dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.*

[18] The law relating to unjustified dismissal in such situations was set out by the Court of Appeal in *Nelson Air v. NZALPA* [1994] 2 ERNZ 665 at 669 as follows:

> *Ms Hardy submitted that in holding the dismissal procedurally unfair and substantively unjustified, the Court failed to recognise that less stringent requirements apply in the case of an employee on trial or probation than in the case of an ordinary employee. That there is a difference is well accepted. The whole purpose of a probationary period is to enable the employer to assess the suitability of the employee. That will normally be in terms of skills, diligence and personality … the prime concern for Air Nelson was of attitude and personality; in short, whether he would be a good team member. If he proved not to be, and of course if he proved unsatisfactory in any other respect, the airline was entitled not to confirm his appointment.*

> *It could either dismiss him or offer to extend the probationary period. But it had to act fairly. It was under no less obligation to act as a good employer.*
>
> *The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not simply be a critical observer, it must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequence if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.*

[19] In that case the successful pilot was awarded lost remuneration and other compensation totalling $56,000, despite the existence of the trial period.

[20] It is significant here that employment could only be assured after the trial period if the employer's standards were met. Equally pivotal is that the employer may not simply be a critical observer and must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met.

Determination

[21] Here, both parties operated throughout the course of the employment under different views about how the probation period was playing out. Mr Ma'a was seen to be not meeting Brix N Blox's standards in important areas, namely quantity and quality of work being done, and his getting on with the rest of the team. As the Court of Appeal makes clear, these are the employer's standards, not Mr Ma'a's.

[22] On the other hand, Brix N Blox clearly failed in its duty to inform Mr Ma'a of his shortcomings, so that he might improve. On the one occasion where it was agreed that issues were clearly raised with Mr Ma'a (over his use of the cellphone at work), I accept Mr Ma'a's evidence and Mr Aston's grudging acceptance that his behaviour changed, and thus Mr Ma'a had taken on board the concerns raised by Brix N Blox. In all other respects it appears, however, that Mr Aston on behalf of Brix N Blox was simply a critical observer, particularly as he was one step removed from the day-to-day operations of general masons such as Mr Ma'a.

[23] There is little doubt that this dismissal was unjustified, because Brix N Blox's actions do not meet the standard set out in *Air Nelson*. It is fundamental to employment law that employees, even on probation, are entitled to fair warning that their employment is in jeopardy. In the clear absence of such a warning, the dismissal here was unjustified.

[24] Had Brix N Blox put its concerns to Mr Ma'a in a direct and fair manner, they may have been addressed by him, as did occur with the issue of the use of the cellphone at work. On the other hand, I accept the evidence of Mr Aston that Mr Ma'a's performance did not meet the company's standards in a number of areas, including quantity and quality of work. On the other hand, an employer can not complain that an employee is not working hard or well enough for them by their own standards, yet not clearly outlining to the employee its concerns, how they might be remedied, and what would happen if they were not.

[25] Given all the circumstances, I consider that the amount claimed of $4531.81 gross, being for the period until the Mr Ma'a got another job, is an appropriate award. There is no telling how long Mr Ma'a's employment may have lasted had Brix N Blox's concerns been properly relayed to him and thus no certainty that he would have been dismissed two weeks later than he was, at the end of the trial period.

[26] I accept that Mr Ma'a suffered greatly as a result of leaving his job, without any form of prior warning as to his performance, and with the dismissal meeting coming unannounced. On the other hand, Mr Ma'a knew that he was on trial and that permanent employment could only be assured if Brix N Blox's standards were met.

[27] I take into account, in mitigation, the fact that Mr Ma'a has been able to move on to more enjoyable employment. Ordinarily I would have awarded the sum of $5,000 compensation in order to justly compensate Mr Ma'a for the way he was treated. However, given the clearly impecunious state of Brix N Blox and the consequent uncertainty surrounding any payment to Mr Ma'a, I decline to make any award of compensation, in order to give the company a better prospect of paying the awards made, even if over time (*Northern Clerical IUW v Beachlands Engineering Ltd* [1991] 3 ERNZ 1023 applied).

[28] I decline to make any reduction for contributory conduct. While I accept that Mr Ma'a's performance was not up to the standard of that expected by Brix N Blox of

a general mason, I conclude that this was not as the result of any blameworthy behaviour by Mr Ma'a, who no doubt was trying to do his best. In the absence of proper warnings by Brix N Blox it is thus not appropriate to categorise such behaviour as blameworthy and therefore contributing to his dismissal, particularly given the significant procedural shortcoming that led to that unjustified dismissal.

[29] I therefore order the respondent, Brix N Blox Limited, to pay to the applicant, Mr Marcus Ma'a, $4531.81 gross in lost remuneration.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority